GAR Global Arbitration Review

# The Guide to IP Arbitration - Third Edition

## A look to the future of international IP arbitration

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Traditionally, large IP owners have been hesitant about international arbitration – too scary (no prospect of appeal), inferior decision makers (compared with top judges), etc. Now, many are changing their minds. This timely book sets out how arbitration can be tailored to meet the needs of IP owners and dispels some of the myths surrounding its use. It is in four parts that mirror the life cycle of disputes and will be of interest to newcomers and aficionados alike.

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# A look to the future of international IP arbitration

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## Summary

## INTRODUCTION

Traditionally, disputes concerning IP rights were mainly heard before national courts. In recent years, however, there has not only been a general increase in IP-related disputes but also a significant shift towards the resolution of IP disputes through arbitration.[2] For example, the number of cases decided under the World Intellectual Property Organization (WIPO) Arbitration and Mediation Rules increased from 36 in 2012 to 263 in 2021 and to 548 in 2022, showing an increase of over 100 per cent over only one year.[3] While 44 per cent of these cases concerned patent disputes in 2014, there appears to have been a shift towards disputes over copyrights, digital content and trademarks in recent years (only 15 per cent of patent cases in 2023). The IP-related caseload of established arbitral institutions is rising, as is the number of IP-related arbitral institutions around the globe.[4]

There are many reasons for this trend towards arbitrating IP disputes. Primarily, this trend is because of the territorially limited scope of state court proceedings. This feature of state court litigation no longer meets the requirements of complex cross-border economic processes and transactions, and related disputes arising from a more globalised world.[5]

The move towards arbitration is a logical shift because arbitration is particularly suitable as a more efficient process to resolve international IP disputes involving multiple jurisdictions.[6] Arbitration not only brings advantages to solving international disputes, but its confidential nature is also especially valuable for IP disputes in general because of the sensitive nature of confidential information and know-how regularly involved in such disputes. In addition, specialist knowledge is often required to resolve technical IP disputes efficiently – a difficulty that can be addressed by appointing suitably qualified arbitrators. All these advantages contribute to the rise of and the trend towards using international IP arbitration.

Based on the conclusion that international IP arbitration continues to grow in popularity, certain crucial questions arise regarding the future of arbitration and its role in IP dispute resolution:

- What do trends show and where should arbitration professionals focus their efforts?
- Can arbitration keep pace with innovation and technological advancements? And how should it adapt and prepare for upcoming trends?
- What additional advantages can arbitration bring in the future compared to other methods of dispute resolution?

## LATEST TRENDS

### ARBITRABILITY AND ENFORCEABILITY

It is well established that arbitral proceedings cannot take place in the absence of a valid arbitration agreement, which generally results from an existing contractual relationship.[7] In the absence of a contract containing an arbitration agreement, parties may still agree to enter into an arbitration agreement after a dispute has arisen. This is, however, rather rare.[8]

Because disputes over ownership,[9] validity or infringement of IP rights generally do not involve a previous contractual relationship between the parties, these disputes are most often handled by state courts.[10] In addition, many countries reserve disputes about the validity of IP rights for state courts (arbitrability) and do not recognise or enforce foreign

arbitral awards on the question of validity (enforceability).[11] Accordingly, there is little incentive for parties to agree to arbitration if the enforcement of the award would have to take place in such a country.

This does not mean that international arbitral tribunals are always prevented from deciding disputes over the validity of IP rights. While the legislation or case law of many countries does not allow arbitral tribunals to declare IP rights to be invalid with ***erga omnes*** effect (and, respectively, does not allow enforcement of such awards[12]), arbitral tribunals may require the owner to withdraw its IP right from the respective registries if a country acknowledges that the award establishing the invalidity may have ***inter partes*** effect.[13]

In general, there appears to be an international trend towards extending the arbitrability and enforceability of any type of IP dispute, including disputes on ownership, validity and infringement.

Singapore, for example, enacted the Intellectual Property (Dispute Resolution) Act 2019. This law strengthens Singapore's position as a choice venue for the arbitration of international IP disputes because it explicitly states that any type of IP dispute, including those regarding ownership, infringement and validity, may be arbitrated and enforced in Singapore with ***inter partes*** effect.[14]

Hong Kong has passed similar legislation. Whereas Hong Kong's Arbitration Ordinance did not expressly address the question of arbitrability of IP disputes in the past, an amended ordinance (which came into force in 2018) now clarifies that parties can use arbitration to resolve any type of IP dispute.[15] Arbitral tribunals seated in Hong Kong now have the power to award any remedy or relief that could also be ordered by the Hong Kong state courts in civil proceedings.[16]

An arbitral award, whether it was made within or outside Hong Kong, for any type of IP dispute can consistently be enforced in Hong Kong.[17] The enactment of the amended ordinance coincided with the Hong Kong International Arbitration Centre's launch of a new Panel of Arbitrators for Intellectual Property Disputes, which comprises experts with experience in IP disputes. This initiative was aimed at further strengthening Hong Kong as an international IP arbitration venue.[18]

There is not only a trend in legislation but also in case law in favour of wider recognition of the arbitrability of validity cases. In Germany, the Landgericht München expressed in a decision an ***obiter dictum*** according to which it doubts that validity disputes should not be arbitrable at all.[19] It saw no reasons why an arbitral tribunal should not be able to decide such a matter with ***inter partes*** effect. The court held that a claim for an assignment of a patent application is arbitrable as parties can agree on the assignment of a patent at any time (disposable monetary claim); therefore, this can also be subject to a decision of an arbitral tribunal.

There are also countries with legislation or case law recognising arbitral awards on the validity of IP rights with ***erga omnes*** effect. In Switzerland, every aspect of IP disputes may be subject to arbitration with ***erga omnes*** effect. Belgium also has a relatively liberal approach, but the arbitrability of validity disputes depends on the nature of the right involved (disputes about the validity of copyrights and patents are generally arbitrable, but those related to trademarks and designs are not).[20]

Whereas it might be simple to find a place of arbitration providing for the arbitrability of all kinds of IP disputes, the question of enforceability remains relevant. One of the main

reasons parties prefer an arbitral award over a state court judgment is because of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which allows for a simple enforcement of foreign arbitral awards in more than 169 jurisdictions.[21] As mentioned, the enforcement of awards on the validity of IP rights is, however, still limited in numerous countries.

Article V(2)(a) of the New York Convention enables the courts of a contracting state to refuse recognition and enforcement of an award if they find that the subject matter of the dispute that led to the award is not capable of settlement by arbitration under the law of the country where recognition and enforcement is sought. Accordingly, even if a dispute is arbitrable in a certain jurisdiction, the advantage of arbitration is lost if the award cannot be enforced in countries where it should have its effects. Continuation of the trend towards increased international arbitrability and enforceability of any IP dispute is, therefore, to be welcomed.

**INTEGRATION OF ADR IN STATE COURT PROCEEDINGS**

The fundamental shift away from ordinary proceedings towards alternative dispute resolution (ADR) in the field of intellectual property is not only evident from the trend towards arbitration; ADR is also becoming more integrated in IP-related state court proceedings.-[22] Among other things, over 50 countries have cooperated with WIPO to develop or enhance their ADR services, especially with respect to mediation.[23] The number and ways of collaboration with WIPO are manifold and constantly increasing.

Various countries require mandatory mediation proceedings in commercial cases, including in IP disputes. While in the past, mandatory mediation schemes were typical for some common law jurisdictions (e.g., Australia), an increasing number of countries with different legal traditions have decided to implement the same types of schemes (e.g., the Philippines, Argentina, Greece, Romania, India and Turkey).[24] Turkey, for example, introduced in 2019 mandatory civil mediation for commercial cases including monetary IP disputes.[25] In the Philippines, mediation is mandatory for certain types of IP disputes administered by the Intellectual Property Office.[26] There have been similar institutional developments in Singapore, where the Intellectual Property Office developed a mediation option for trademark and patent proceedings under its collaboration with WIPO, and an expert determination option for patent proceedings.[27]

This trend towards integrating ADR is also apparent in Europe. Greek legislation made mediation mandatory in all civil and commercial disputes of a monetary claim of €30,000 and more, as well as for non-monetary claim disputes (e.g., claims for prohibiting IP infringement).[28] Portugal has even implemented mandatory arbitration proceedings for certain cases of infringement disputes concerning patents and supplementary protection certificates.[29] In England and Poland, there is an optional cooling-off period by means of mediation in trademark opposition proceedings. This trend towards ADR was supported by a decision of the Court of Justice of the European Union (CJEU) from 2017 (Case C-75/16). The CJEU concluded that mandatory mediation as a pre-condition to litigation is not inadmissible under the EU legislative framework, provided that the parties are not prevented from exercising their rights of access to the judicial system.[30]

In light of the fact that international commercial disputes (including IP disputes) are increasingly being heard in arbitration, some countries are seeking to retain their state courts' appeal by establishing specific courts or chambers for international commercial dispute resolution. In the past few years, many new courts or chambers have been

established around the globe, such as the International Division of the Patent Court of Korea, the Singapore International Commercial Court, the Chamber for International Commercial Disputes of the District Court of Frankfurt am Main, Germany, the International Chamber of the Paris Court of Appeal, France, the Netherlands Commercial Court and the Brussels International Business Court, Belgium. In Switzerland, there are plans to establish an International Commercial Court in Zurich and Geneva.[31]

## FUTURE DEVELOPMENTS

### UPC

One of the most notable projects in Europe related to IP dispute resolution is the establishment of the Unified Patent Court (UPC). The establishment of the UPC goes along with the introduction of the unitary patent, which makes it possible to obtain a European patent with unitary effect in the EU Member States participating in the UPC system. The UPC has exclusive competence in the participating Member States in respect of unitary patents and (subject to exceptions during transitional periods) European patents. UPC operation started after the Agreement on a Unified Patent Court (UPCA) entered into force on 1 June 2023.[32] In statistics published in April 2024, since 1 June 2023, the Court of First Instance has received 311 cases, including 110 infringement actions. The Court of Appeal has received 27 appeals.[33]

In addition to the UPC (comprising a court of first instance, a court of appeal and a registry), the UPC Agreement also provides for the establishment of a Patent Mediation and Arbitration Centre (PMAC) to handle patent disputes under the UPCA. The PMAC, located in Lisbon and Ljubljana, is responsible for setting mediation and arbitration rules, compiling lists of mediators and arbitrators, managing ADR for unitary patents and fostering dispute resolution. Further, Rule 11(1) of the UPC's Rules of Procedure allows the UPC to recommend parties to seek settlement through the PMAC. Whether ADR will become a standard feature in this UPC system remains to be seen.

The jurisdiction of the arbitration centre is rather limited as a patent may not be revoked or limited in mediation or arbitration proceedings. There remains a certain margin of interpretation regarding the wording of the UPCA, and some suggest that an award on the validity of a patent should at least have an ***inter partes*** effect.[34]

### SEP/FRAND

ADR in technology-related disputes is a matter of growing interest and is by no means a new phenomenon. It is, therefore, unsurprising that the importance of ADR has also increased in the context of the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms.[35] Technical standards play an increasing role in the modern world, and FRAND disputes have been addressed by state courts in several jurisdictions, resulting in the determination of FRAND licensing terms under different applicable laws and different approaches and methodologies.[36] Because multi-jurisdictional litigation has several drawbacks, there has been a trend in recent years towards arbitration for such disputes.

Standards setting organisations, such as the Institute of Electrical and Electronics Engineers, nowadays support the use of arbitration (e.g., by including arbitration agreements in their IP policies) for, among other things, the determination of royalties respecting FRAND principles.[37] Another example is the International Seed Federation, which supports the use

of arbitration for resolving a wide range of disputes, including those related to IP, through its trading rules and guidelines.[38]

Several large SEP/FRAND arbitration proceedings have already been conducted,[39] and different initiatives have been launched to further strengthen the importance of arbitration. In 2017, WIPO developed and published the Guidance on WIPO FRAND Alternative Dispute Resolution (ADR), which aims to facilitate submissions of FRAND disputes to WIPO mediation and arbitration.[40] The Guidance, among other things, explains the procedural options that are available at different stages of the process and identifies key elements that the parties may wish to consider to shape the arbitration proceedings.[41] In 2018, the WIPO guidance was followed by the FRAND ADR Case Management Guidelines of the Munich IP Dispute Resolution Forum.[42] While the WIPO guidelines focus closely on the services provided by the WIPO Center, the guidelines of the Munich IP Dispute Resolution Forum expand on FRAND ADR in general and, as such, may work in synergy with the WIPO guidelines.[43]

The response from authorities and the public to resolving SEP/FRAND conflicts through ADR has been positive. The advantages of arbitration for SEP/FRAND disputes are manifold:

- it is more effective in terms of settling disputes over a large number of jurisdictions with simpler enforcement;
- there are specialised arbitrators with the necessary expertise, both in a legal sense and from a technical point of view;
- there is more flexibility in setting the process rules regarding, for example, issues of confidentiality in this highly competitive field; and
- there may be consideration of certain restrictions in the interest of other market participants and the general public.[44]

Accordingly, the trend towards arbitration in this area is expected to continue.

**LIFE SCIENCES**

The life sciences industry is innovative and dynamic. The development of life-saving medical products, such as therapeutics, vaccines, diagnostics and medical devices, regularly involves licensing, joint research and development, and acquisition agreements that are supported and governed by numerous and often complex contracts. Various stakeholders may be potential parties, including public institutions (e.g., government agencies, research institutions and universities), which see the private nature of ADR as a key advantage (i.e., that the parties can agree to keep all or certain elements of the dispute confidential). Given the particularities of the related business strategies, it is not surprising that interest in ADR in this industry is very high, as disputes are often complex and highly technical.

The popularity of mediation and arbitration in the life sciences industry is also reflected in the number of cases submitted to the WIPO Center, with nearly 15 per cent of the Center's cases involving parties from the life sciences industry.[45] Besides the general ADR options offered by the WIPO Center, including mediation, arbitration and expert determination, since 2022 it has launched new options specially tailored for life sciences. These include mediation for contract negotiation and dispute management (of conflicts deriving from those contracts), dispute resolution boards, particularly designed to manage long-term collaborations, and

IP valuation services to determine the monetary value of the IP assets forming the subject matter of a contract or dispute. [46]

Deal mediation was developed as part of the WIPO COVID-19 Related Services and Support package to assist countries in their economic recovery after the covid-19 pandemic. Since then, the WIPO Center has seen a rapid increase in the use of mediation to facilitate contract negotiations, helping parties minimise disruption to their long-standing business relationships.

**TRADE FAIRS**

During the peak of the covid-19 pandemic, most trade fairs around the globe were cancelled. Currently, such events have been rescheduled, and in certain areas there seems to be a need to catch up on the missed opportunities in prior years. Consequently, dispute resolution mechanisms related to trade fairs are again returning to the spotlight. ADR at trade fairs is widely used around the world because it offers a fast and efficient dispute resolution mechanism, which is required to resolve the dispute and to stop infringements with immediate effect during a trade fair.[47]

Trade fair organisers have an interest in supporting their trade fair exhibitors and IP rights holders in dealing with IP disputes to minimise such disputes and the disturbance of the trade fair. There are, in principle, three different ways[48] for them to do so:

- Trade fair organisers may inform the exhibitors about IP protection and include IP clauses in their trade fair terms and conditions that are aimed at preventing IP disputes by obliging exhibitors to follow IP laws.
- Trade fair organisers may provide legal support for IP rights holders. This is, for example, done by the Consumer Technology Association, which runs the International Consumer Electronics Show in Las Vegas and which supports IP rights holders if they want to visit exhibition booths where they believe that the exhibitor displays infringing products.[49]
- The most sophisticated form of trade fair organiser involvement in IP enforcement comprises the establishment and maintenance of ADR mechanisms that address IP rights violations that have allegedly occurred at trade fairs.[50]

IP rights holders usually want to immediately stop any infringing activity at a trade fair. Local law may provide for emergency relief proceedings in national courts. In the United States, for example, courts may award a temporary restraining order (TRO), which it may order ***ex parte***, without hearing the alleged infringer.[51] As a result of the US Supreme Court decision in ***eBay v. MercExchange***,[52] the applicability of TROs in connection with trade fairs in the United States is limited because TRO motions require a showing of evidence of a likelihood of irreparable harm, which is unlikely to be collectible in the short time frame of a trade fair.[53]

Some national courts have noted that the requirements for proceedings in connection with the infringement of IP rights at trade fairs are different from ordinary proceedings in which infringement of IP rights is alleged; therefore, some national courts have deliberately adjusted to the needs of trade fair participants offer standby services for trade shows.[54]

If a national court system does not provide suitable avenues for relief, ADR offers alternative mechanisms. For example, Palexpo Trade Fairs in Geneva, Switzerland (based on the former Baselworld watch fair) offer ADR mechanisms for IP disputes.[55] The fast-track

procedure, established together with WIPO, grants exhibitors and non-exhibitors a cost- and time-efficient legal mechanism to protect their IP rights and related commercial interests at the trade fair within 24 hours. Likewise, in Singapore, SingEx offers a fast-track IP dispute resolution procedure for SingEx trade and consumer fairs in collaboration with the WIPO Center.[56]

ADR procedures are likely to become more important if trade fairs increasingly take place online. ADR procedures are more flexible and can provide for online dispute resolution. It will be interesting to see whether the pandemic will have a lasting impact on the manner in which trade fairs are conducted and on related opportunities for ADR.

**BLOCKCHAIN AND SMART CONTRACTS**

In recent years, there has been an increase in blockchain-related technologies in commercial contracts and the proliferation of smart contracts.[57] In essence, blockchain technology is a transparent, secure information storage and transmission technology that operates without a central control body.[58] Blockchain can be described as a shared database filled with entries (the 'blocks' in the 'chain') that must be confirmed and encrypted and that contain the history of all exchanges between its users since its creation.[59] The database is secure and distributed: it is shared by its different users, without intermediaries, which allows everyone to check the validity of the string and which makes it difficult or impossible to change, hack or cheat the system.[60] The chained data blocks often contain 'transactions', but from a technical point of view, any other type of information can be stored as well.[61] On those grounds, combined with other technologies, blockchain has many useful applications.

A key example of a blockchain application are smart contracts. These are stand-alone programmes stored on a blockchain that, once started, automatically execute the predetermined terms and conditions of a contract (input or 'oracles') without requiring human intervention.[62] By using blockchain technology for smart contracts, a series of coded contractual clauses sit on the blockchain and enable self-enforcement of the rights and obligations of the parties.[63]

Blockchain technology may have many applications in the field of intellectual property. For example, it may be used in:

- smart contracts to automatically execute IP contracts, such as licensing contracts;
- proving the creation or ownership of IP rights;
- copyright management, particularly in the field of online music distribution;
- the transmission of payments in real time to rights holders;
- the authentication of goods; and
- the detection of counterfeits.[64]

The Internet Court in Hangzhou, China has admitted evidence that was authenticated by blockchain in an online copyright infringement case.[65]

How could the use of blockchain technology potentially change arbitration? As a stand-alone tool, it may be used to simplify and improve existing processes in the administration of arbitration proceedings.[66] This means, on the one hand, that an arbitration clause could be included in the code of a smart contract (e.g., an IP licensing or exclusive distribution contract).[67] In that event, an arbitration clause would need to become a smart arbitration

clause.[68] In the event of a dispute, a predefined arbitration process would follow.[69] On the other hand, blockchain could also affect the analogue nature of arbitration proceedings themselves, which could be automated via blockchain.

Apart from the arbitration clause in a smart contract, various stages of the arbitration proceedings could also potentially be affected. For example, the submission and taking of evidence and the enforcement of arbitral awards could each potentially use the benefits of the technology to enhance the efficiency of proceedings.[70]

Even if technical, legal and practical questions still exist regarding the implementation of blockchain-based arbitration dispute resolution mechanisms (e.g., whether a smart arbitration clause meets the requirements of Article II of the New York Convention), this is no longer the realm of science fiction: there are already various blockchain-based platforms on the market (e.g., Juripax, Kleros, Codelegit, Aragon, Mattereum and Sagewise).[71] Kleros, for example, describes itself as a decentralised court system allowing for the arbitration of smart contracts by crowdsourced jurors relying on economic incentives.[72] The smart contract must specify the dispute resolution mechanisms, such as which court (of the Kleros system) will be used, how many jurors will hear the case, what are the options for jurors to vote, and what the consequences on the contract will be after the ruling is made.[73]

The effective impact of these new technologies will also depend on the extent to which these new dispute resolution mechanisms are explicitly recognised and regulated in local and international legislation or case law. The emergence of new types of disputes will also influence the field of arbitration.

In response to the inflexibility of existing arbitration rules in accommodating blockchain disputes, recent initiatives, such as the 2021 Rules for the Resolution of Digital Disputes, have emerged. The Rules empower arbitration tribunals with specialised authority over digital assets such as cryptocurrencies and non-fungible tokens.[74] These powers include the ability to modify and delete digital assets, which would help prevent liquidation of assets and avoid enforcement. Regarding pseudonymity concerns, the Rules mandate parties to disclose identity details and evidence.[75]

Blockchain's unique characteristics, which challenge traditional dispute resolution methods, lend themselves well to ADR, particularly arbitration. As blockchain applications grow, so does the need for customised dispute resolution. While traditional methods remain viable, the unique concerns of blockchain stakeholders require ADR solutions.

## AI MAKING ITS WAY INTO ARBITRATION

Since the launch of OpenAI's ChatGPT in November 2022, the role of generative AI (GenAI) has been the main theme dominating conversation on the use of technology. This is true also with regard to international arbitration. Further, in the legal context, customised GenAI tools (e.g., ArbiLex, Casetext, CoCounsel and Harvey) and productivity tools such as Microsoft Copilot are already being developed and increasingly used, not only by parties but also by courts and arbitrators.[76]

On 13 March 2024, the European Parliament approved the Artificial Intelligence Act, the world's first comprehensive AI law, which aims to make AI systems safe, transparent, traceable, non-discriminatory and environmentally friendly. So far, there is no specific EU regulation that explicitly requires lawyers or users to disclose their use of AI in legal proceedings; however, transparency and disclosure obligations can arise from broader

legal and ethical principles. It may, therefore, be appropriate to include provisions in future arbitration rules requiring the disclosure of AI methods used in the preparation of legal arguments or evidence, particularly where non-disclosure could affect the fairness or integrity of the arbitration.

The areas of application of AI are very broad. For example, ChatGPT and other large language model tools can be used to improve and accelerate the processes of document creation, party collaboration, predictive analysis, dialectical reasoning and 3D modelling.[77] Subject to party consent, arbitral tribunals may employ GenAI to draft the procedural history of an arbitral award, even in preparing reasons and determining the merits of a dispute.

However, practical problems such as data security and manipulation of evidence require controlled and transparent use of those models.[78] The threat of deepfakes to the credibility of evidence and arbitration proceedings poses new challenges that must be prevented through preventive measures, such as the watermarking of recorded hearings and the use of specialised videoconferencing software. In this context, initiatives such as the draft of the Guidelines on the Use of Artificial Intelligence in Arbitration, which were recently published for comment by the non-profit Silicon Valley Arbitration and Mediation Center, are very welcome but still rare. Intended as a point of reference for all parties involved, the Guidelines address issues such as the need to maintain confidentiality and the non-delegation of an arbitrator's decision-making authority.[79]

One interesting example of the use of AI in proceedings is the various tools that have been developed to predict likely litigation outcomes, such as La Machina, Solomonic and Rocketeer. The live demonstration of the AI tool Rocketeer, which is capable of predicting trademark conflict outcomes, illustrates the practical application of AI. Even if AI only has, for example, an 80 per cent accuracy rate, businesses may find AI preferable to costly legal advice as a more efficient alternative at the onset of dispute resolution.[80]

What is certain is that the influence of AI on the arbitration process is a trend that should be closely monitored.

**ADVANCED USE OF TECHNICAL TOOLS IN ARBITRATION**

Although it may take some time until AI, blockchain technology and smart contracts significantly influence the arbitration process, we have seen in recent years how other technical developments have already changed arbitration proceedings, in particular during the covid-19 pandemic.

The pandemic demonstrated that arbitration could provide greater flexibility in times of crisis than litigation in national courts. Arbitrators and practitioners around the world reacted quickly to the challenges posed by the pandemic by, for example, shifting to remote hearings as an alternative to in-person hearings, moving the venue of a hearing to a region less affected by pandemic-related restrictions and adopting a documents-only procedure.[81]

Although there was a growing interest in the use of technology in arbitration even before the onset of the pandemic, the pandemic led to an increased use of already existing technological tools. The WIPO Center, for example, makes available at no cost to interested parties an online case administration platform, the WIPO eADR platform (which is already used in 30 per cent of the cases), and assists in the hosting of online meetings and hearings.-[82]

For its part, the International Chamber of Commerce (ICC) established a working group, in response to the pandemic, to update the 2017 edition of its report on information technology in international arbitration. The report has undergone a complete overhaul and now includes a variety of practical resources, including sample procedural language relating to technology tools and solutions, checklists for virtual hearings, items to consider when choosing an online case management platform and a template procedural order.[83]

Before the pandemic, online dispute resolution was already widely used for domain name disputes. The WIPO Center had another record year for domain name dispute filings in 2023, with more than 6,000 complaints being filed – an increase of more than 7 per cent over 2022 and of 68 per cent since the start of the covid-19 pandemic.[84] Internet domain name disputes are usually governed by the Uniform Domain Name Dispute Resolution Policy, which provides for online dispute resolution, among other things. Online dispute resolution is now also increasingly used in other areas, and the trend towards online dispute resolution will likely continue because of cost and time benefits.

Further, as a growing number of practitioners now have experience with online dispute resolution, they are increasingly comfortable with it. Traditional proceedings without any use of technological methods will become increasingly harder to justify. This is apparent from the ICC survey conducted in 2021, which showed, among other things, that 88 per cent of practitioners agree that it should be the norm post-pandemic to conduct case management and other procedural conferences as virtual, rather than in-person, meetings.[85]

Online dispute resolution will no doubt continue to play an increasingly more active role in the arbitration landscape.

**SUMMARY**

IP arbitration is on the rise. Globalisation and the advent of new technologies have not only increased the importance of the field of intellectual property but also the number of disputes in this field.

Many current trends will continue and have a lasting impact on the future of IP arbitration:

- The question of whether a dispute is arbitrable at all is becoming less relevant. Arbitral tribunals increasingly address this issue by ensuring that the award has *inter partes* effect only. Additionally, trends show that state authorities increasingly recognise and enforce arbitral awards relating to IP disputes (including validity issues).
- ADR is expected to become more integrated in regular state court proceedings (e.g., in the European UPC system).
- Arbitration may face increasing competition from national courts to handle IP disputes. For fear of losing large international proceedings to arbitration tribunals (including IP disputes), the number of ordinary commercial courts offering a specialised international chamber and the application of English as the procedural language is likely to increase.
- Regarding SEP/FRAND, life sciences and trade fair disputes, arbitral tribunals will become more important in the future as arbitration is more suitable for those types of disputes as compared to national courts.
- Developments in the area of blockchain and smart contracts are promising. Arbitration proceedings as we know them today could change permanently if

arbitration clauses in smart contracts trigger an automated process, and the various steps in arbitration proceedings are completed through blockchain.

- The trend towards online dispute resolution and the use of various technological tools will continue because of demonstrated cost and time advantages.
- Among emerging technologies, GenAI will significantly impact arbitration.

Nobody knows precisely what the future will bring to IP arbitration. Lawyers should keep an eye on the evolving practice in the field as new technologies continue to develop.

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**ENDNOTES**

**[1]** Thomas Legler is a partner and Alexandra Bühlmann is an associate at Pestalozzi Attorneys at Law Ltd. The authors would like to acknowledge the contribution of attorney-at-law Severin Etzensperger to this chapter.

**[2]** Thomas Halket, ***Arbitration of International Intellectual Property Disputes***, Huntington, 2021. Jonathan DeFosse, Hwan Kim and Natalia Szlarb, 'The Growing Importance of International Arbitration for Intellectual Property Disputes', ***The National Law Review***, Vol. X, No. 73 (13 Mar. 2020).

**[3]** Among the cases referred to the World Intellectual Property Organization (WIPO) in 2021 and 2022, copyright and digital content and trademarks disputes have been most common, followed by patent, commercial and ICT disputes. See WIPO, 'WIPO Caseload Summary', www.wipo.int/amc/en/center/caseload.html (accessed 22 Feb. 2024).

**[4]** Historically, WIPO was one of the first institutions in this field, having set up its Arbitration and Mediation Center in 1994. The Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) have both established panels of arbitrators for IP disputes. In the United States, the Silicon Valley Arbitration and Mediation Center provides various services related to tech arbitration.

**[5]** IPDR Forum: Munich IP Dispute Resolution Forum, 'IPDR Forum: Mission', www.ipdr-forum.org/mission (accessed 8 Apr. 2024).

**[6]** American Arbitration Association, '"Products of the Mind" Require Special Handling: Arbitration Surpasses Litigation for Intellectual Property Disputes', www.adr.org/sites/default/files/document_repository/AAA192_Intellectual_Property_Disputes.pdf (accessed 8 Apr. 2024). According to the 'International Survey on Dispute Resolution in Technology Transactions' conducted by WIPO in 2013, 32 per cent of the participants indicated a preference for a forum selection clause in favour of state courts for their IP disputes, 30 per cent of the participants include an arbitration clause in their respective contracts and 12 per cent opt for mediation as their preferred dispute resolution method. In general, survey participants noted a trend towards greater use of alternative dispute resolution in this area. For further information, see Queen Mary University of London, 'Pre-empting and Resolving Technology, Media and Telecoms Disputes: International Dispute Resolution Survey', 2016. See also Thomas Legler, 'Arbitration of Intellectual Property Disputes', ***ASA Bulletin***, 2019, p. 290.

**[7]** Legler, p. 291.

**[8]** ibid.

**[9]** Disputes about the ownership of patents or patent applications are, however, sometimes handled by arbitral tribunals based on an arbitration clause contained, for example, in a research and development agreement, a licence or a distribution agreement. See Andrea Mondini and Raphael Meier, 'Patentübertragungsklagen vor internationalen Schiedsgerichten mit Sitz in der Schweiz und die Aussetzung des Patenterteilungsverfahrens', ***sic!***, Vol. 5, 2015, p. 289 ff.

**[10]** Legler, p. 291.

**[11]** ibid.

**[12]** The arbitrability of IP disputes and the enforceability of awards goes hand in hand: countries that do not provide for the arbitrability of certain IP disputes usually also do not enforce awards on disputes rendered by arbitral tribunals seated in other countries.

**[13]** This is, for example, the case in the United States, Canada, Singapore and France.

**[14]** See Sections 52A and 52B of the Intellectual Property (Dispute Resolution) Act No. 17/2019

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